CHSHCEE Newsletter

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Envisaged Relaxation of the Incorporation Rules for Limited Liability Companies

On 23 July 2015, Austria's Council of Ministers announced the intention to draft a government bill aimed at simplifying the process of incorporating a limited liability company in Austria, the most commonly used legal entity to run a business, by relaxing in particular the relatively burdensome formal requirements.

Generally speaking, the first step to incorporating a company under the Austrian Act on Limited Liability Companies ("GmbHG") is the preparation of articles of association in the form of a notarial deed. If signed by an authorised representative, the respective power of attorney must bear a notarised signature (Section 4 para. 3 GmbHG). When applying for registration with the Austrian Companies Register, the document on the appointment of the managing director(s) (and the document on the appointment of a supervisory board, as the case may be) must also be supplied in notarised form, as well as the related specimen signature sheet(s). The registration of the company with the Companies Register is of constitutive effect, meaning the company's unrestricted legal existence starts from the date of registration only.

At present, therefore, the incorporation process in Austria as described above usually takes around ten days, in particular due to the range of formal requirements, whereas the average incorporation period in the Member States of the European Union is only 3.5 days. The measures suggested by the Austrian Council of Ministers are consequently intended to bring Austrian practice into line with that of other Member States.

Signatures which currently need to be notarized, for instance, are replaced by electronic signatures (i.e. signatures by mobile phone). Another change concerns so-called "standardised incorporations", meaning that if standard articles of association are used, a respective notarial deed is no longer required, provided that the document prepared represents an equivalent solution that meets the common requirements with regard to the prevention of white-collar crime, since it is still essential to ensure the sincerity and sustainability of company incorporations.

The proposed legislative changes are primarily aimed at reducing the costs incurred and time of registration and are meant to make the process of incorporation as convenient as possible for future founders. The changes are likely to affect approximately 4,500 new company incorporations each year.[1]

The simplification measures are expected to be adopted in early 2016.

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[1] "Reformdialog Verwaltunsgvereinfachung" as quoted in Feltl, BMJ: Vereinfachung der Formvorschriften für GmbH-Neugründungen, in Zeitschrift für Gesellschaftsrecht 2015/6, p. 314.

Changes in company law

Law No. 308-Z "On Amendments to Certain Laws of the Republic of Belarus relating to Companies" ("Law 308") was adopted on 15 July 2015 and will enter into force on 26 January 2016. Law 308 will introduce a number of long-awaited amendments to company law and the civil code, the most significant of which include the possibility of a limited liability company ("LLC") and a joint stock company ("JSC") having a sole shareholder, as well as the possibility to enter into a shareholders' agreement. Both of these amendments break new ground in Belarus; however, their introduction was very much expected by the local business community as they bring Belarusian corporate law a step closer to international standards.

Sole Shareholder in an LLC and a JSC

Currently only a unitary enterprise – a form of legal entity in Belarus – may have one shareholder. An LLC and JSC must have at least two shareholders. However, a unitary enterprise is a very inconvenient legal entity from the perspective of corporate governance and in the event of a potential sale. For example, a unitary enterprise may not have a board of directors as well as a collective executive body. It is only possible to have a two-tier governance structure: founder (owner) and a sole director. Besides, the sale of a unitary enterprise is possible only as part of a sale of a complex of assets, which is treated by law as a real estate transaction. As an alternative, it is possible to convert a unitary enterprise into an LLC by adding a second shareholder and then selling shares in such an LLC. For the reasons mentioned above, most investors prefer to incorporate an LLC or a JSC with two shareholders, one of which holds a minimal nominal share, for example, 0.1 percent.

However, from 26 January 2016 an investor will have the possibility to incorporate an LLC or a JSC solely and to own 100% of its shares. Nevertheless, there will be one exemption. A Belarusian solely owned LLC or JSC may not have a shareholder that is another solely owned LLC or JSC.

Shareholders' Agreements

Currently the relationship between shareholders in a Belarusian LLC and a JSC is governed by company law and the company's charter. The law does not provide an opportunity for any other formal agreements to be entered into. In many cases, foreign shareholders in need of a shareholders' agreement have had to resort to structuring their investment via an offshore company; an intermediate shareholder registered in a jurisdiction where shareholders' agreements are allowed.

Now the Belarusian legislator has decided to make life easier for foreign investors. Law 308 makes it possible for investors to enter into a shareholders' agreement. A shareholders' agreement may specify the way in which certain parties are required to vote at a shareholders' meeting and lay down other rights and obligations for shareholders, for example, call options or put options, drag-along rights, etc., none of which may run contrary to the mandatory rules of corporate law. At the same time, for reasons not entirely clear the legislator decided to place restrictions on the right to enter into a shareholders' agreement. At least one shareholder must not be a party to the agreement. This restriction makes it impossible to have a shareholders' agreement in companies with one or two shareholders. From a practical perspective, such a restriction does not make sense and hopefully it will be revoked in the near future.

A shareholders' agreement is solely binding on its parties. In case of breach, the liable shareholder might face civil liability as envisaged under the shareholders' agreement (penalties, payment of damages, etc.).

Other Amendments

In addition, Law 308 will also introduce a few other amendments aimed at clarifying the current provisions of corporate law. For example, the personal liability of members of the management bodies of a company will be increased. In particular, members of a board of directors voting in favour of proceeding with a transaction with an affiliated entity which subsequently causes damage to the company may in future be found jointly and severally liable vis-à-vis the company up to the amount of the damage incurred.

Summary

Law 308 will undoubtedly introduce progressive reforms to Belarusian corporate law, the introduction of which has been expected for a number of years. The changes will drastically improve the corporate law regulations and they represent the next step toward bringing Belarusian law into line with international standards. The new rules on the possibility of a sole shareholder and a shareholders' agreement are welcomed by the local business community as it is expected they will contribute to an improvement of the investment climate in Belarus.

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Amendments to the Civil Procedure Code

Amendments to the Bulgarian Civil Procedure Code were recently introduced with effect from July 2015. The most important amendments are outlined below.

(a) Reduced scope of cases subject to cassation procedure

Prior to the amendments being introduced, only judgments relating to claims of up to BGN 5,000 (in civil cases) and BGN 10,000 (in commercial cases) were excluded from appeal before the Supreme Court of Cassation. The changes introduced increase the threshold for commercial cases to BGN 20,000. Further, certain types of cases are excluded from appeal in general. These include judgments on cases related to alimony claims, matrimonial claims, and certain claims under the Family Code, the Agricultural Land Ownership and Use Act, the Restoration of Ownership of Forests and Forestry Lands Act, the Ownership Act, the Act on Condominium Ownership Management, the Civil Registration Act, the Settlement of Collective Labour Disputes Act, and the Labour Code.

(b) Amendments triggered by EU Regulation 1215/2012

Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters took effect in January 2015. The new regulation repealed and replaced Council

Regulation (EC) No 44/2001. Regulation (EU) No 1215/2012 further facilitated enforcement within the EU and introduced simplified rules for direct enforcement. Article 39 of the regulation stipulates that a judgment given in a Member State which is enforceable in that Member State will be enforceable in the other Member States without any declaration of enforceability being required. To reflect these changes, the Bulgarian Civil Procedure Code was amended accordingly to ensure the direct enforcement of judgements from other Member States in Bulgaria.

Amendments to the Protection of Competition Act and the Foodstuffs Act

The amendments were introduced so as to better protect food producers and suppliers in their relations with food retailers as it is claimed the latter have a stronger market position. The new provisions prohibit an undertaking from abusing its stronger position in negotiations where this conflicts with fair business practices, is damaging or might impair the interests of the weaker party to the negotiations or the interests of consumers in general. Under the new provisions, business practices are defined as unfair if they do not serve a purpose that can be justified on economic grounds; this includes an unjustified refusal to deliver goods or provide services, the imposition of unreasonably heavy or discriminatory terms and conditions, and the unfounded termination of business relations. Further, the assessment of whether a stronger position in negotiations exists needs to take account of the level of dependence between the undertakings involved, the nature of their business and the difference in scale, and the possibility of finding alternative supply sources, distribution channels or customers.

In addition, the amendments to the Foodstuffs Act have introduced certain restrictions on the wholesale of foodstuffs. The act provides a list of prohibited clauses, terms and conditions in wholesale contracts for foodstuffs. Such clauses include those which restrict the purchase/sale of goods from/to third parties, prevent a party from providing the same or beneficial commercial terms to third parties, enable any party to unilaterally amend the contract unless this has been explicitly agreed upon, allow the payment of a consideration for services not actually provided, impose terms of payment exceeding 30 days from the invoice date or the date of the invitation for payment, and prohibit the assignment of claims under the contract to third parties, etc. Food producers and retailers are required to amend existing contracts accordingly within six months in order to ensure compliance with the new provisions.

The amendments are expected to have a significant impact on the retail markets, in particular on the food market. Although the amendments were mostly intended to deal with problems on the food market, they might also affect players with a strong position on other markets.

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Joint representation of a company by a member of the statutory body and an authorized agent

In the Czech Republic it has been possible for a company to be represented by a member of a statutory body acting jointly with an authorized agent (procurist) for over a year and a half now. However, given that neither Czech legislation nor case-law expressly regulate the joint representation of a company by a member of a statutory body acting jointly with an authorized agent, companies still do not make much use of this option.

The previous and new status

In the past it was not possible for a member of a statutory body and an authorized agent to act jointly on behalf of a company. Whilst the actions of the statutory body were regarded as acts taken directly on behalf of the company, the actions of an authorized agent were defined as acts taken by the representative of such a company. It was then laid down in the commercial code that any act taken on behalf of the company may only be taken either by its statutory body or by its representative, not by both acting jointly.

However, under the new Civil Code which entered into force on 1 January 2014, the statutory body now acts as a representative of the company, as does the authorized agent. However, the fact that neither the new Civil Code nor the Business Corporations Act explicitly state that it is possible for the statutory body and the authorized agent to act jointly, unlike in Germany and Austria for example, but does not prohibit this either, remains problematic. Given that the statutory body of the company now acts on the same level as the authorized agent, the main argument as to why it was considered unacceptable for them to act jointly, became irrelevant.

Practical use

The possibility for a company to be jointly represented by an authorized agent and a member of the statutory body simplifies the functioning of a company in situations where the statutory body comprises several members and shareholders insist on at least two persons acting on behalf of the company, bearing in mind that some members of the statutory body are not always available to represent the company. In such cases the authorized agent can take the place of one member of the statutory body.

It is still a question of whether joint representation by a member of the statutory body and an authorized agent can be said to equate with placing internal restrictions on the managing director's authorisation to act on behalf of the company or whether such joint representation can be regarded as a means of acting on behalf of the company as a whole. Where a company does not make provision in its articles of association for a member of a statutory body to represent the company jointly with an authorised agent, this would not have an impact on the validity of the company's actions. While in case such a provision exists, the absence of the authorized agent would mean the company is not bound by such acts. In this case, it could lead to a restriction of the authorization to act for companies with a statutory body consisting of only one member, but not for companies with a statutory body consisting of more than one member.

This implies there are two important conditions that have to be met when a member of the statutory body and an authorized agent act jointly on behalf of the company. First, the company has to have a statutory body with multiple members and second the stipulated means of acting on behalf of the company must allow for representation of the

company by members of the statutory body alone (i.e. executives or members of the board of directors) without the authorized agent.

The provision relating to how the joint stock company (or limited liability company) may be represented can be entered into the Commercial Register in the following way: "The company is represented by two members of the board of directors acting jointly or by one member of the board of directors together with an authorized agent."

Conclusion

Until such time as there is relevant Czech case-law on this subject, it will be necessary to rely on the abovementioned arguments. Nevertheless, in our experience the registration courts have already registered similar kinds of acts of the company to those mentioned above. It is therefore likely that the Czech legislator will explicitly permit joint acts of the statutory body and the authorized agent or doing so will find acceptance in case-law.

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Changes in privacy law

On 1 October 2015 major changes were introduced to the way in which personal data can be transferred to third countries. In line with the provisions of the Data Protection Directive, Hungary's Act CXII of 2011 on Privacy and the Freedom of Information ("Privacy Act") also introduced the concept of "Binding Corporate Rules" (BCR).

It is now much easier for highly structured company groups with a large number of members to transfer data to third countries. If a company group that is present in at least one EEA member state needs to transfer personal data to a non-EEA country, it can draw up its own BCR and obtain authorisation for them. As a result, if a data subject has not given consent to the transfer of his or her personal data but there are sufficient grounds for the transfer under the Privacy Act, the BCR will allow the company group to transfer the data to countries not on the "white list" of safe countries. The most important factors that will be examined during the authorisation process at the national and EU level are the description of data processing procedures and data protection safeguards, and in particular, the rules on cooperation with data protection authorities and the legal remedies available to data subjects. The authorisation process is based on standardised documentation and is conducted largely in English.

Another new concept introduced in the Privacy Act is known as a "data protection incident" and it has particular relevance for electronic telecommunication companies. Under the Privacy Act, a data protection incident occurs when personal data is processed unlawfully, and in particular, when personal data is accessed, altered, transferred, published, erased or destroyed without authorisation or when it is destroyed or compromised accidentally.

If a data protection incident occurs, the data controller has an extensive obligation to log events and it must also report the incident, within a very strict time limit, to the National

Media and Telecommunications Authority ("NMHH"). In certain statutorily defined cases, the data controller must also inform the relevant data subjects and, in addition to cooperating with the NMHH, it must also monitor whether the actions taken by it to mitigate the consequences of the incident are having or have had the desired effect.

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Stimulating investment – Business Angels Law

The law on stimulating investment by individuals ("Business Angels Law") entered into force in July 2015 and governs the conditions under which individual investors – so-called business angels – are eligible to benefit from several tax exemptions as a result of providing micro and small enterprises with an injection of capital through the acquisition of shares.

To this end, the individual investor (i.e. the business angel), the shareholders of the company and the company need to conclude a contribution agreement. It is mandatory for such an agreement to specify (i) that the capital injection takes place by means of a capital increase with the issuance of new shares and (ii) the resulting share premium. In order to be valid, the agreement must be registered with the competent trade register, indicating also the investor's status as business angel.

Conditions for micro and small enterprises to benefit from the Business Angels Investment

To qualify as a business angels investment, micro and small enterprises have to be established as limited liability companies. Moreover, such companies must not be insolvent or bankrupt or be subject to the procedure of preventive concordat or liquidation proceedings.

Companies operating in areas such as banking; insurance and reinsurance, capital markets, financial intermediation, other activities in the financial field; real estate leasing, brokerage, and development; gambling and betting; steel production or marketing; the production or marketing of coal; the construction of sea and river vessels; the production or marketing of weapons, ammunition, explosives, tobacco, alcohol, substances under national control, plants, narcotics and psychotropic substances and preparations; and advice in any field, cannot be supported under the business angels incentive scheme.

Conditions for granting tax incentives to investors

To be eligible for the tax incentives under the Business Angels Law, the individual investor must be a person outside of the company who acquires the position of shareholder of the company in exchange for a cash contribution to its share capital. The

investment should result in the investor being issued new shares. Business angel investments may not fall below EUR 3,000 or exceed EUR 200,000, and they are limited to 49% of the share capital of the company subject to the investment.

The business angel investor will acquire the shares following the capital increase. It is mandatory that the amount invested in the company be paid through the Romanian banking system. The strict purpose of the investment will be to fulfil the main object of the company and to achieve the business plan in respect of which the individual investor invests funds.

Furthermore, to qualify as a business angel, the individual investor must have a clean tax record and not have been convicted of property-related offences, or found guilty of breach of confidence, corruption, embezzlement, forgery or tax evasion.

Tax incentives granted to business angel investors

Under the Business Angels Law, individual investors are exempt from income tax on dividends for those dividends payable in relation to shares acquired as part of a business angels investment. Such exemption applies for a period of three years starting from the acquisition of the shares. In the case of a share transfer, the investor is also exempt from tax on income from the share transfer if such transfer is made at least three years after the investor acquires the shares.

The incentives mentioned above will apply to a total amount not exceeding that of the investment made by the business angel investor.

To be eligible for said tax incentives, the following conditions must be cumulatively met:

i. the individual investor – business angel – may not transfer the shares for a period of three years starting from the date of their acquisition. Otherwise the investor has to pay the income tax on dividends and/or the income tax on the investment related to the transfer of shares, from which he was initially exempt;

ii. the Articles of Association of the Company must contain the following clauses:

   – shareholders participate in the profit and loss of the company in proportion to the percentage of shares they hold in the company;

   – in relation to the investment made, decisions on the business plan and waiver of any profit distribution will be taken with the unanimous consent of all partners;

iii. the company and shareholders will not use the share premium for the purpose of the capital increase and will not distribute it to the shareholders for a period of three years from the date of registration of the individual investor – business angel – with the Trade Register.

Conclusion

The purpose of this law is to encourage investment in micro and small enterprises by creating a special and more favorable fiscal regime for those individual investors seeking business opportunities they deem worthy.

To benefit from the tax incentives, the individual investor must be a natural person outside of the company providing a cash contribution in exchange for the issuance of new shares, up to a limited investment of 49% of the share capital of the company. The individual investor is exempt from income tax on dividends for a period of three years from the acquisition of shares, provided that the purpose of the investment is to fulfil the main objective of the company and achieve its business plan.

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Personal Data Protection

In connection with the amendment of Act No. 122/2013 Coll. on Personal Data Protection as amended, the period provided for under the Act for harmonisation of contractual relationships between data controllers and data processors lapsed on 1 July 2015. Data controllers are now entitled to entrust the processing of personal data to a processor only on the basis of a written agreement.

The competent authority will impose a fine of between EUR 1,000 and EUR 200,000 on any data controller which fails to fulfil or violates the obligation to entrust the processing of personal data to the processor.

Whistle-Blower Protection

The period provided for by the recent amendment to Act No. 307/2014 Coll. on Certain Measures related to the Reporting of Anti-Social Activities and on amendments of certain laws for establishing an internal reporting system for anti-social activities lapsed on 30 June 2015. Failure to comply with the obligations imposed by the Act could result in the imposition of fines of up to EUR 20,000.

The fulfilment of obligations under the new Act is supervised by the Labour Inspectorate which is also authorized to impose the fines stated above.

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